UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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U.S. SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v. 21 MC 0810 (JPO)

TERRAFORM LABS PTE, LTD. and DO KWON,
Respondents. Remote Conference

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February 17, 2022
11:00 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

U.S. SECURITIES AND EXCHANGE COMMISSION
BY: JAMES P. CONNOR

DENTONS US LLP
Attorneys for Defendants
BY: DOUGLAS W. HENKIN

(The Court and all parties appearing telephonically)

(Case called)

THE DEPUTY CLERK: Starting with the petitioner, counsel, please state your name for the record.

MR. CONNOR: Good morning. This is James Connor for the SEC.

THE COURT: Good morning.

MR. HENKIN: Good morning, your Honor. This is Douglas Henkin for Mr. Kwon and Terraform Labs.

THE COURT: Good morning.

All right. Thanks for joining. I would appreciate it if you would all state your names before speaking so the transcript is clear as to who is speaking.

I scheduled this call in response to the briefing, as we discussed at the last conference, which was back on December 3rd, and this matter is an application by the SEC to enforce an administrative subpoena. The respondents are Terraform Labs and Mr. Do Kwon.

I have read the briefing and the subsequent letters, and I will start with the SEC. And I guess -- well, maybe I won't start with the SEC actually. Maybe I will start with Mr. Henkin. You're the one that really wanted oral argument. So here it is.

MR. HENKIN: Thank you, your Honor.

Look, I will not go over everything that was said in

the papers, but the case here is that the SEC wants this Court to condone what is a very crystal-clear violation of one of their own rules that they wrote and they are now unhappy with because of the way it applies in this case. If they don't like the way the rule works, there is a way to try to change it, but this proceeding isn't that way.

The SEC has known that Mr. Kwon and TFL are represented by Dentons since just days after the SEC sent Mr. Kwon a request for voluntary cooperation, months before it tried to serve the subpoenas that are at issue. The SEC's regulations prohibit the SEC staff from serving subpoenas on people who are represented by counsel.

THE COURT: Wrong.

What the rule says is, whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance.

Have you filed a notice of appearance -- had you, at the time it was served before the SEC?

MR. HENKIN: Before that, your Honor, we had provided the SEC -- and you can see this in the exhibits to Mr. Senderowitz's declaration -- we had provided them with all the contact information that was required by a notice of appearance. And in the *Deloitte* case, the SEC took the position that that is sufficient to become a notice of appearance.

And with respect to --

THE COURT: I don't care what the SEC said in that case. It's not binding on me. Plus, in that case, it was completely different, because in that case, the party had agreed to accept service and then was reneging.

I don't know how you can get around this language. It says, whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance. Then it goes on and says, other methods of service, i.e., in situations where no one has filed a notice of appearance, service may be made by delivering a copy, handing a copy to the person required to be served. That's what happened.

MR. HENKIN: That's the difference between this case and the ordinary circumstances in which that rule applies. The service on counsel idea applies only in circumstances in which the SEC has gotten jurisdiction over someone. Remember that in this instance, this started with the SEC sending requests for voluntary cooperation to Mr. Kwon and TFL. Mr. Kwon and TFL then immediately retained counsel to represent them in connection with the underlying proceeding and responding to those requests.

THE COURT: If we are not in the world where the SEC has acquired jurisdiction and notices of appearances are being filed, then why doesn't (c) of 150 apply allowing personal service? Because it was just really annoying and bad?

MR. HENKIN: No. It doesn't apply because when you read through the full rule, starting with 203.8, it directs you to (b). And that's how you get there. The way you get there is that 203.8 of the SEC's rules relating to investigations say, service of subpoenas issued in formal investigations, investigative proceedings, shall be effected in the manner prescribed by Rule 232(c).

Then you jump to 232(c) of the Rules of Practice, which say the provisions of this paragraph (c) shall apply to the issuance of subpoenas for purposes of investigations, and instructs that service shall be made pursuant to the provisions of Rule 150(b) through (d). So it expressly includes 150(b).

And then 150(b) says, upon a person represented by counsel, whenever service is required to be made upon a person represented by counsel, who has filed a notice of appearance pursuant to Rule 201.102, service shall be made pursuant to, and then it continues as your Honor was discussing.

There was no place to file a formal appearance form here because of the way that this had begun.

THE COURT: What is the first thing you cited, 203 point what?

MR. HENKIN: 203.8 of the SEC's rules relating to investigations, which are separate from the Rules of Practice, your Honor.

THE COURT: Right. Service of subpoenas issued in

formal investigative proceedings shall be effected in the manner prescribed by 232(c).

MR. HENKIN: Of the Rules of Practice, your Honor.

THE COURT: Right. So what does that then say?

MR. HENKIN: Then that says, the provisions of this paragraph (c), so 232(c), shall apply to the issuance of subpoenas for purposes of investigations. And it goes on to say that service shall be made pursuant to the provisions of 201.150(b) through (d), which is Rule 150(b) through (d) that we have been talking about.

THE COURT: So that includes (c).

MR. HENKIN: It includes (c), but it starts with (b). And so the question is --

THE COURT: That's because (b) comes before (c) in the alphabet.

MR. HENKIN: In the way the rule is structured.

What you have here, though, is you have a situation in which the genesis of this dispute started with the SEC seeking voluntary cooperation, and counsel appearing and being recognized in the proffer letter, by the way, which was drafted by the SEC.

THE COURT: So your view is that when someone cooperates and can have counsel for a limited purpose, that they then shield themselves from being subject to service by the SEC?

MR. HENKIN: Well, I wouldn't say for a limited purpose. The retention was for -- we knew that there was a formal order of investigation, and so Dentons was retained for that purpose. And if you look at the SEC's proffer letter, which is an exhibit to Mr. Senderowitz's declaration -- by the way, which was written by the SEC, recognizing Dentons as counsel for both Mr. Kwon and TFL in connection with the investigation and the responses to the voluntary request.

What you have here is a circumstance in which the SEC would like to get to a place where it doesn't have to abide by Rule 150(b) when it starts out this way. And there is a reason, by the way, your Honor, that it started out with requests for voluntary cooperation. If it really believed that there is personal jurisdiction over Mr. Kwon and TFL, then why at the very beginning -- and this is going back to May of 2021 -- didn't it try to serve subpoenas on Mr. Kwon and TFL? Why did it continue with additional voluntary requests for information sent to Dentons as counsel for Mr. Kwon and TFL?

There was a very clear recognition by the SEC that we were acting as counsel for TFL and Mr. Kwon in connection with this entire inquiry. And then, in the midst of it, because the SEC got unhappy with the way things were going, and you know this from reading Mr. Landsman's declaration, he was monitoring Mr. Kwon's Twitter feed, took this upon himself and took a shortcut.

And there is a reason, by the way, an ethical reason, which we point out in our brief, why Rule 150(b) should be interpreted this way. A lawyer in a case should never directly contact a party opponent he knows to be represented by counsel unless authorized by law. And that comes from Rule of Professional Conduct 4.2(a), which directly applies to the SEC staff, as we noted in our brief. And that, by the way, explains precisely why, as soon as we identified ourselves to the SEC staff, all the communications after that were between the staff and counsel.

THE COURT: You have segued a bit into personal jurisdiction, which I think is the real issue here. And all your argument about how to interpret Rule 150 is, once you know somebody has counsel, you have to serve them through counsel, but then we can also reject service. And that's just not a reasonable reading of the rule. You're saying that the rule creates this gap between being able to serve someone.

Now, you might believe that 150(c) is not operative when there is no personal jurisdiction. Obviously, that's the argument. But I just don't think your reading of the rule is tenable at all. Because you're arguing that we should rely on this section (a) that says, when you file a notice of appearance, service is through them. But when you file a notice of appearance, you are agreeing to the jurisdiction. You can't reject service then. So you're saying there is this

gap in the rule that is not there.

MR. HENKIN: Well, no, actually, I am not saying that there is a gap. I am actually saying the opposite, your Honor.

The problem here is that there is an assumption in connection with the idea that we declined to accept service.

First of all, the question was never asked. One of the things that we pointed out in our submission is that the SEC never asked us to accept service of anything. In fact, they never notified us about the subpoenas until the e-mail that was sent, which you also have in the record, by the way, that's Exhibit 4 to Mr. Senderowitz's declaration, that notified us that they believed that they had served Mr. Kwon.

So there was never a request. So the idea that we were asked to accept service and declined is false. That never happened. The SEC doesn't know what would have happened if they had asked us to accept it. And your Honor knows from private practice what happens when there are requests, but that didn't happen here. And you have a situation where there is counsel representing parties in the context of what has been identified as a formal order of investigation. Everything that your Honor has seen in the record talks about the fact that there is a formal order of investigation. And when there is counsel under those circumstances, it's our view that the only reading that makes sense is the reading that they are required to either ask counsel, which didn't happen, so we put that one

off to the side because they just never asked, or get an order from the Commission, which they didn't do. So neither of the things that 150(b) says, and it's either/or, neither of those things happened.

THE COURT: So 150(b) does say service shall be made electronically in the form and manner to be specified by the office of the secretary on the Commission's website. Why doesn't the courtesy copy, which was electronically made to you after the personal service, why doesn't that satisfy (b)? Because it didn't come with the magic words "we hereby serve you"?

MR. HENKIN: No. It's not a question of magic words, your Honor. It's a question of reading that e-mail. It says, "Please see the attached subpoenas for Do Kwon and Terraform Labs Pte Ltd. that were served this morning personally on Do Kwon. If you would like to discuss further, please e-mail me some proposed times to speak."

That's the entirety of that e-mail. It didn't say, and this qualifies as service on you. It didn't ask the question. It didn't do anything other than assert that they had been properly served on Mr. Kwon that morning. And so if that service was in fact not proper, because it didn't comply with 150(b), that's the end of the inquiry. That's the argument that we are making with respect to 150(b).

The e-mail just doesn't say what the SEC would like it

to say. And there was never a follow-up saying, well, will you accept them nunc pro tunc, or can we try again, or any of the other various things that they could have done. That's the sum total of the e-mail.

THE COURT: Let me give Mr. Connor a chance to respond to any of those points briefly. I want to leave personal jurisdiction to the side for now.

Mr. Connor.

MR. CONNOR: Thank you, your Honor. This is James Connor for the SEC.

Your Honor, whether the question is under 150(b), 150(c), or 150(d), the SEC unquestionably effected proper service on Mr. Kwon.

Rule 150(d) -- and this is the only portion of the rule that specifically references investigative investigations -- says, service of an investigative subpoena may be made by delivering a copy of the filing. And then it defines delivery as personal service handing a copy of the person required to be served.

That's exactly what the SEC did here. The SEC hired a process server -- did not communicate with Mr. Kwon, as respondents' counsel incorrectly stated, but actually hired a process server to effect service of the subpoena. That alone under 150(d) should end the inquiry.

But if the Court looks at 150(b), every part of that

rule supports the SEC's position. As your Honor pointed out, it says, Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance. There is no dispute now that respondents' counsel did not file a notice of appearance. But even if a formal filing of a notice of appearance is not required, Rule 150(b) references 17 C.F.R. 201.102 when it references a notice of appearance. And that section, the title of that section, subpart (d), says designation of address for service. The entire point of Rule 150(b) is to allow for service through counsel. Counsel's supposed partial representation does not allow them to not accept service if they claim that they entered an appearance in the case.

Again, whereas here, counsel does not agree to accept service, they have not entered an appearance in the investigation for purposes of Rule 150(b). So, therefore, it was fully proper for the SEC to serve Mr. Kwon personally.

They claim they provided the business address and e-mail address, but again, they wouldn't accept service through those addresses. So the SEC was not required to get an order from the Commission.

Counsel for respondents I think attempts to be a little coy in whether they would or would not accept service, but their filings are very clear on the issue. On page 15 of their opposition brief, they quote a case that says service of

process on an attorney not authorized to accept service for his client is ineffective. And then, in paragraph 8 and 21 of the complaint that they filed, they state the SEC knew it could not serve subpoenas on Mr. Kwon or TFL.

So, essentially, what respondents' counsel has stated is that they were not authorized to accept service. And since they are not authorized to accept service, it was fully appropriate for the SEC to serve Mr. Kwon personally.

Now, even if respondents' counsel is correct about everything they said, regarding a notice of appearance, regarding Rule 150(b), the dispute here is academic because the SEC served counsel through electronic means, which is specifically allowed for in Rule 150(c).

Now, counsel makes the argument that the SEC didn't provide the, quote, magic words necessary to effect service. But the rules answer this question. Rule 150(e) specifically states that electronic service is complete upon transmission. So the SEC does not have to say, attached is a copy for service. All the SEC is required to do is actually send the subpoenas electronically to respondents' counsel, and that is exactly what the SEC did here.

So because the SEC has followed the administrative steps in serving the subpoenas, the Court should enforce the subpoenas.

The only other point I will raise about the *Deloitte*

case that counsel relies very heavily in their briefing was in a completely different circumstance in which the attorney in that case had actually agreed to accept service. So because counsel agreed to accept service, that's why the SEC served upon counsel, and then they tried to renege that years after the fact. So the *Deloitte* case and this case bear no resemblance. The SEC followed Rule 150, and so, therefore, the Court should enforce the subpoenas.

Thank you.

MR. HENKIN: Your Honor, can I jump back to just a few quick things about that?

THE COURT: Sure.

MR. HENKIN: I am actually glad that Mr. Connor focused on our citation of the *Zherka* case because what that really shines a light on is the fact that there was never a request for acceptance of service. Because, as your Honor knows from being in private practice, when counsel for an opposing party makes a request, will you accept service of A, B, C or D, on behalf of your client, you then go to your client, talk about it with your client, and decide how to respond. That request was never made here. And that request is particularly important here because the idea of electronic service being effected as soon as something is sent means one thing, when jurisdiction has been gotten over a party, and it means something entirely different when the document that you

are attempting to serve is the document -- when it is in itself a compulsory process document.

That's what they attempted to serve here, and that's why we cited the *Zherka* case and specifically service of process on an attorney not authorized. Essentially, the argument that Mr. Connor made would turn any lawyer, who appears on behalf of an entity that is asked to provide voluntary cooperation with the SEC, into an authorized agent for service of process for anything that the SEC then wants to serve on them. And that's not the way any of this works. That would mean, if you took it to its logical conclusion, that the SEC could decide to commence an enforcement proceeding and just e-mail a copy of it to Dentons, and according to the SEC's reasoning, that would count as service on Mr. Kwon or TFL, for example. That cannot be and isn't the way the law works.

The last two things I will say is Rule 150(b), if you read it, specifically relates to investigative subpoenas. That's something that I noted before. And the notice of appearance in an investigative proceeding is exactly what we provided because when all that is going on is voluntary cooperation, that's all there is, and then you get to where we are now.

THE COURT: OK. Thank you for those arguments. I would like to move on to the personal jurisdiction issue, if we could.

I think again I will start with Mr. Henkin, if you don't mind, because you had addressed the issue of potentially filing a reply brief and really wanted to be heard after what you suggested were some new points made in the reply. What we are really talking about is any of the bases for purposeful availment of United States by Kwon and Terraform such that personal jurisdiction for purposes of the subpoena would be appropriate.

So, Mr. Henkin.

MR. HENKIN: Sure. Thank you, your Honor.

So let me address that in two steps.

The first step, and we alluded to this in the letter, but I just want to highlight it, there are a number of things that are stated in Mr. Landsman's reply declaration where he talks about, for example, in paragraphs 3, 4 and 5, evidence that is not before the Court that the SEC wants the Court to rely on with respect to the personal jurisdiction arguments that it makes in the reply brief. And they all start with actually the same phrase: the staff has obtained evidence of an agreement or a document, and so on. But those documents are not in the record, and the only things that are in the record are Mr. Landsman's characterizations about those documents. We don't think that the Court should be relying on any of that for a number of reasons. One, it's hearsay, possibly multiple levels depending upon which document we are talking about; and

also, Mr. Landsman isn't competent to testify about those documents. None of them are SEC documents, for example.

So that's the overall point that I wanted to make with respect to that. And that applies to all of the assertions that are in Mr. Landsman's reply declaration.

With respect to jurisdiction itself, I was surprised, frankly, that the SEC argued in the reply brief that there is general jurisdiction over Mr. Kwon, because as your Honor knows, it's not at all clear that general jurisdiction can apply to individuals. In the *Burnham v. Superior Court* case from 1990, the Supreme Court said it may be that general jurisdiction only applies to corporations. And in the *Hoechst Celanese* case, from the Middle District of Florida, from 1995, the court said it's not clear that general jurisdiction can ever be held over a private nonresident defendant. And your Honor in the *Reich v. Lopez* case, from 2014, this was applying New York law and citing the Second Circuit's decision in the *Roman Catholic Diocese* case, you noted that for an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile. And for Mr. Kwon, that was Korea and is now Singapore. So the idea that there is general jurisdiction over Mr. Kwon just doesn't fly here.

I guess I should pause there and ask if your Honor has any questions.

THE COURT: I guess I am wondering about what that

means in terms of the *Kidder, Peabody* case that the SEC cites, which says that Exchange Act, Section 27 confers personal jurisdiction over a defendant who is served anywhere within the United States, that is, that service alone covers personal jurisdiction.

MR. HENKIN: I think that flips the issue on its head, your Honor, because essentially that's making general jurisdiction over an individual apply on -- essentially tag jurisdiction or happening to travel through the United States. Whereas I think the ordinary course definition, going all the way back to *Burnham*, is that for general jurisdiction -- and this is also true under pretty much every state law that I am aware of -- is that in order for general jurisdiction to exist as opposed to specific jurisdiction, that is limited to the domicile. And to allow the SEC to just assert general jurisdiction over somebody by the happenstance of them happening to be in some sort of the U.S., continental U.S., at some point, when their domicile is outside the United States, I think that would raise some fairly significant due process issues.

THE COURT: OK.

MR. HENKIN: I think the best way to read that statute is it is a territorial limitation on what the SEC can do, not as something that creates general jurisdiction in circumstances where it otherwise wouldn't exist.

THE COURT: OK.

So let's get into specific personal jurisdiction. I don't know that there is a lot of daylight between how that would apply with respect to Mr. Kwon and with respect to Terraform Labs, because he is the cofounder and CEO and what he is alleged to have done, in terms of United States-focused activities, was really all coextensive with Terraform Labs, or doing it for Terraform Labs.

So how do you respond to the various ways in which the SEC contends Kwon and Terraform were availing themselves of U.S. markets and activity?

MR. HENKIN: So two points about that. One general and then I will get into the actual assertions of the contacts themselves.

The first part -- and we fully briefed this and there essentially was not a response to it -- there is a little bit of daylight between Mr. Kwon and TFL, in the sense that even if jurisdiction could be had, even if service was proper of the subpoena directed to Mr. Kwon, handing him a subpoena when he is transiting the United States for TFL is not effective service. And the SEC didn't really have a response to that. We cited multiple cases saying that just handing a subpoena to an officer of a company, when he or she happened to be transiting through the United States, is not sufficient to get jurisdiction over the entity as opposed to the individual.

Now just getting into the specific issues, I think what you have to do is you have to look at the subpoenas and the underlying investigation. The subpoenas, like the investigation, are focused on whether mAssets or MIR tokens might be securities that TFL might have sold or marketed to U.S. investors. And nothing that the SEC has focused on shows either Mr. Kwon or TFL marketing or selling those things to U.S. persons. So they don't count for the purpose of establishing specific jurisdiction.

What they point to, for example, on page 6 of the reply, is that Mr. Kwon spoke at a New York event as the cofounder and CEO of Terraform. That's the way they phrase it. That's not purposeful availment. He was speaking on a panel about emerging blockchain technology, not conducting business. It's not even related to the Mirror Protocol. The SEC, by the way, did not challenge this in its reply papers. The panel that he spoke on was called "The Multichain Future is Here," and it was about how leading blockchains inter-operate with each other and various developments in cross-blockchain technology. That's not purposeful availment with respect to the Mirror Protocol or MIR tokens.

They argue also that Mr. Kwon promotes the Mirror Protocol through TFL's website, web app, social media, podcast interviews and U.S. media. But they don't identify anything he said on any of those platforms to promote the Mirror Protocol

to U.S. investors as opposed to just around the world, which, as your Honor is aware, is not sufficient. The SEC only identifies two items even in the U.S. media about Mr. Kwon, and neither of them involves marketing to U.S. investors.

Then they say that Mr. Kwon talked to Coinbase, which led to a contract to list MIR tokens on Coinbase. A couple of things about that.

First of all, Mr. Kwon wasn't a party to the agreement between Coinbase and Terra. He didn't sign it. Two, his communications with Coinbase didn't cause the SEC to issue the subpoenas. The subpoenas don't even ask about those communications.

Then they also point to a contract whereby a U.S. digital -- and this is actually in paragraph 3 of Mr. Landsman's reply declaration -- a U.S. digital asset trading platform paid a Terra subsidiary $200,000 for MIR tokens. But, first of all, as I pointed out, in general, there is no competent evidence about this in the record. All of this is from statements by Mr. Landsman about a document he claims to have reviewed. So that's hearsay. And he is not competent to testify about it. It's also irrelevant because the most that this shows is that some U.S. entity purchased MIR tokens from a subsidiary of TFL, and that doesn't establish jurisdiction over TFL or Mr. Kwon.

And I would refer your Honor back to your own opinion

in *Alibaba v. Alibabacoin*, which held that contracting with a company in the forum doesn't support jurisdiction unless the case relates to that contract. And specifically what your Honor said in that case was that Alibaba had contracted with Digital Ocean LLC, which was headquartered in New York City, to host the website. But even if Alibaba's websites were hosted in New York, that alone is insufficient to establish personal jurisdiction. That covers everything that the SEC has argued here and means that it is not sufficient to support the exercise of specific jurisdiction.

There is also, by the way, a line of cases going back 130 years that hold that listing -- let me take a step back here and say, I am going to talk about equity securities because that's what the cases that I am about to describe cite. I am not acknowledging or admitting or agreeing that anything that we are talking about in this proceeding is an equity security or is a security at all. But these cases are interesting because for 130 years people have been trying to argue that merely choosing to list an equity security on a U.S. equity exchange, such as NYSE or AMEX or NASDAQ, is sufficient to create jurisdiction in some U.S. forum.

Literally, going back to 1890, and this is discussed in the *Wiwa v. Royal Dutch Petroleum* case in the Second Circuit, and in a whole series of other cases that I can give you, but even doing that, even listing your securities on a

U.S. market is not sufficient to establish specific jurisdiction. And that's been the rule quite literally since 1890. You can look at a case called *Law Debenture v. Maverick Tube*, which is 2008 WL 4615896, and several other cases which I could read to you, but if you would like, I can provide them in a supplemental letter. The point is that that sort of activity, and that's the most that you could say that the SEC has asserted here, is not sufficient for specific jurisdiction. So the idea of there is a listing agreement. It's not enough.

Also, and this further distinguishes this case from all of those cases that went before, in all of those cases there were payments to the listing exchange, listing fees, for example. Here, TFL paid the platform nothing and TFL earned nothing from the listing agreement. So it's even less of a support.

THE COURT: What is the entity that it's listed by?

MR. HENKIN: The one that they referred to is Coinbase.

THE COURT: OK.

MR. HENKIN: So that can't be sufficient. If listing on an equities exchange can't be sufficient for personal jurisdiction, then MIR tokens, when it's not even a paid listing, couldn't possibly be sufficient.

THE COURT: But why wouldn't it be sufficient, when you list on Coinbase, that entity pays $200,000 for MIR tokens,

and you have several employees in the United States, including the general counsel. Why else would it have a general counsel in the United States?

MR. HENKIN: It's interesting, your Honor, and that's one of the other reasons that I wanted to bring up these cases because they also go to exactly those questions. Among the things that are alleged in some of them, not all of them, are things like paying someone, having employees in the area, and things like that, as opposed to purposeful availment with respect to the specific issues that are in dispute. And in all of the cases in which those are addressed, and I will give you an example, some of the cases, for example, had situations where underwriters were hired in the same jurisdiction, or where investor relations companies were hired in the same jurisdiction, or where there were small numbers of employees in the same jurisdiction, and again, your Honor, if you want, I can give you a quite long string cite with these cases, but what they uniformly hold is that those things even put together aren't enough.

The reason for that is, if you think about it from a policy perspective, that would discourage companies from coming into the United States, or from even -- essentially, it would make companies do everything they possibly could to avoid contact with the United States, to avoid those things giving rise to personal jurisdiction.

THE COURT: There is also a 2019 custodial services agreement. Is that also with Coinbase or is that with somebody else?

MR. HENKIN: That I believe is with somebody else, although I don't remember off the top of my head because I haven't seen the specific document that's being referred to. But again, that is the equivalent of the cases in which plaintiffs have alleged having a bank account and appointing a transfer agent or a registrar is not sufficient. So, for example, in a case called *Gilson v. Pittsburgh Forgings*, the allegations were, Oh, there is an NYSE listing and there is the appointment of a New York-based transfer agent and registrar, and the court said, no, that's not enough.

THE COURT: You're pointing to four different areas where it's not enough, but here we have all of those things.

MR. HENKIN: No. Actually, in that case, it was the combination was not sufficient.

THE COURT: The second declaration by the SEC, which I realize you have problems with, I think it says 15 percent or some percent of customers are in the United States. Do you have a response to that?

MR. HENKIN: I am trying to find where that is. Notice that it doesn't say customers. What it says -- and this is one of the problems with it. What that paragraph says is, The staff obtained evidence of an e-mail from a Terraform

employee to the U.S.-based digital asset trading platform and U.S.-based outside representatives of the trading platform indicating that about 15 percent of users of the Mirror Protocol come from the U.S.

Now, that's a very, very vague statement because users of the Mirror Protocol doesn't necessarily mean that they were buying or selling mAssets. It also doesn't mean that they were using the Mirror Protocol through a TFL interface. One of the important parts about the Mirror Protocol is that it's just a protocol that operates on the internet. It's essentially been released into the wild, one way of thinking about it, by TFL. TFL doesn't control it. TFL doesn't control what mAssets are minted or how they trade. That is controlled by the Mirror Protocol community. So nothing in that statement says anything about what those users are doing. Another way of thinking about it is those users are not customers of TFL. They are simply using the protocol in ways that TFL has no control over.

THE COURT: Right. That's kind of the brave new world of the blockchain that is what makes this unlike prior cases, right?

MR. HENKIN: It's one of the things, yes.

THE COURT: I want to give a chance to Mr. Connor to address personal jurisdiction as well. Did you cover everything you wanted to, Mr. Henkin?

MR. HENKIN: The only other thing that I would throw

in, your Honor, is that we think that the 2021 case *Blockchange Ventures v. Blockchange, Inc.* is another case that supports our argument that there is no jurisdiction. In that case, the defendant provided digital asset investment services and the plaintiff had pointed to a partnership between the defendant and a New York company for the New York company to share customer information with the defendant, but the court found that there was no jurisdiction because the plaintiff hadn't shown that its case arose out of that partnership. And I think that the cases that the SEC cites do not show the existence of personal jurisdiction here.

THE COURT: All right. Thank you.

Mr. Connor.

MR. CONNOR: Yes, your Honor. Thank you.

I would like to start with personal jurisdiction over Mr. Kwon.

We don't think this is a close question. The court has personal jurisdiction over Kwon because he was served with the subpoena while he was found in the United States. And that "found" language comes from Exchange Act, Section 27, 15 U.S.C. 78aa. And we included the reference to the *Kidder* case, which squarely addresses this question and held that when a person is found in the United States, that it's proper for a court to exercise jurisdiction over that person.

We also cited the *Edelman* case, 295 F.3d 171, that

says, when a potential witness comes to the United States, it is neither unfair nor inappropriate under the statute to undertake his discovery here.

THE COURT: What was that cite of *Edelman*?

MR. CONNOR: 295 F.3d 171.

I think there might be a misunderstanding on the *Burnham* case. Because in *Burnham*, which was a plurality opinion, the court held jurisdiction, based on physical presence alone, constitutes due process. I am just reading from the case. And it reaffirmed a century of judicial practice that serving a person while they are found in the location comports with due process.

I think the confusion is that that doctrine doesn't always apply to corporations, and that's something that the Supreme Court found in *Daimler*. And to be clear, we are not saying that the Court has general jurisdiction over the corporation. We are just saying it has it over Kwon because he was found in the location.

So our position there is supported Supreme Court case law, Second Circuit case law, and the statute itself.

Just turning to specific personal jurisdiction over Mr. Kwon and Terraform, there's numerous minimum contacts that establish purposeful availment of the forum. And I will just tick through a few of these because I think it's important.

First, Mr. Kwon travelled to the United States to

speak at a digital asset conference where he was identified as the founder and CEO of Terraform. He signed an agreement with what we termed as a U.S. digital asset trading platform, but which counsel has identified now as Coinbase, under which the digital asset platform paid a Terraform subsidiary at least $200,000 for MIR mirrors. Again, that was an agreement that was signed by Mr. Kwon personally.

THE COURT: I thought he said he didn't sign it. Maybe I'm wrong.

MR. CONNOR: Yes. Mr. Kwon signed the agreement. I think the caveat there was that the agreement was with a wholly-owned Terraform subsidiary.

MR. HENKIN: Just to be clear, your Honor, the agreement he didn't sign was the listing agreement.

THE COURT: Got it.

So the agreement that you're talking about, the listing of MIR tokens, when was that?

MR. CONNOR: The agreement that I am referring to is not for the listing. It's called a SAFT, which is a simple agreement for future token, and that was signed in 2021. And that was where the U.S. digital asset platform agreed to pay $200,000 for the MIR tokens.

THE COURT: For the tokens.

MR. CONNOR: Yes. Just to be clear, that's separate and apart from the custody agreement and the listing agreement.

This is a third agreement.

THE COURT: So they were buying the tokens from the Terraform subsidiary?

MR. CONNOR: Yes.

THE COURT: All right.

And Coinbase is a U.S.-based entity?

MR. CONNOR: It is.

THE COURT: But this wasn't a listing agreement. They weren't reselling the tokens.

MR. CONNOR: No. But there was also a listing agreement between Terraform and Coinbase as well.

THE COURT: And tell me about that.

MR. CONNOR: That is an agreement, Terraform contracted with Coinbase under which -- and this just addressed the MIR tokens, not the mAssets. But the MIR tokens were, through this listing agreement, made available for trading in the U.S. To be clear, when they enter into the agreement, it's Coinbase that's actually -- once that agreement is made, it's Coinbase that is making them available for sale.

THE COURT: So if I go on, I can purchase MIR tokens through a Coinbase platform now?

MR. CONNOR: Yes.

THE COURT: But what about the argument that there is no ongoing role of Terraform in that situation?

MR. CONNOR: Well, Terraform is -- they call MIR token

the, quote, governance token of the Mirror Protocol, which, again, Terraform developed and continues to maintain. So there still is a relationship between Terraform and the governance token for the Mirror Protocol.

And that's putting aside the fact that, again, Terraform created the Mirror Protocol, which also allowed for the creation of these mAssets. And these mAssets, they mimic the price of U.S.-based equity securities. So, for example, they talk about something called mApple and mTesla. So these are things that Terraform created the infrastructure, and created the Mirror Protocol through which these mimicked assets are developed.

Also, with respect to the custody agreement, Terraform signed a contract, and I think we have identified it as Coinbase, for -- actually, this agreement is with a trust associated with Coinbase. So the custody agreement is not with Coinbase, but with the trust. And that's for the trust to custody and store digital assets on Terraform's behalf. So, again, that's a contract between Terraform and the U.S.-based entity, in which the U.S.-based entity is storing and custodying digital assets on Terraform's behalf. That's continuing, ongoing conduct that's memorialized in an agreement, and that is sufficient for purposes of availment.

That's not even to mention, again, at least four individuals, it's growing, Terraform just hired an additional

general counsel, but there's at least four individuals residing in the United States that are employed by Terraform and press reports -- I will just throw this out there. There's also press reports that Mr. Kwon and Terra-related entities have a new sponsorship agreement with the Washington Nationals. There is section behind home plate called The Terra Club.

So there is significant minimum contacts between Terraform, Mr. Kwon, and the United States that are more than sufficient for the Court to exercise jurisdiction.

I will also point out, Terraform in its briefing tries to minimize the fact that its website and web application allowed U.S. investors to purchase MIR tokens and mAssets. And the way they do this is sort of retroactively. If you look at the declaration of the Terraform employee, it states that the website has been open-sourced and is no longer even hosted by Terraform. But that only changed on November 14, 2021, two days after we filed the subpoena enforcement action. So up until that time, a U.S. investor could go to Terraform's website and purchase these MIR tokens and these mAssets on a website hosted by Terraform. Terraform's belated attempt to kind of eliminate this contact does not change the fact that it hosted the website. And this is just in addition to all the other contacts that I also discussed.

I will also point out, the last point is that Mr. Kwon also promotes the mAssets and MIR tokens in U.S. media. We

included a cite to a Yahoo! News article and Mr. Kwon is quoted as saying, So we have things like Mirror Protocol, which creates synthetic assets that track the price of real-world assets. So this would be, for example, MIR Tesla or MIR Apple, referring to the equity securities of U.S.-based companies Apple, Inc. and Tesla, Inc.

In the end, the question on jurisdiction over Mr. Kwon and Terraform boils down to this. Should the Court exercise personal jurisdiction over a digital asset company, when that company has multiple contracts with a U.S.-based trading platform, markets of digital assets, which mimic U.S. securities to U.S. investors, through U.S. media, employs at least four individuals residing in the U.S. in key positions, and has a CEO who travels to the U.S. on behalf of Terraform to speak at digital asset conferences? We believe the answer is clear and the Court should exercise specific personal jurisdiction over both Kwon and Terraform.

THE COURT: Let me just ask you if you would like to respond to Mr. Henkin's objections to the hearsay and personal knowledge points, particularly with respect to the second SEC declaration.

MR. CONNOR: Sure. With respect to the agreement, as a practical matter, I think counsel has essentially confirmed what we said in the declaration that these agreements exist. He said that they do have agreements with Coinbase. And so

that's the point that we were laying out in the second declaration. We didn't attach the actual agreements to the declaration. We are happy to do that. We have them. We did provide the Bates numbers so that the Court can have some confidence that they do exist, and we will certainly provide them if need be.

As far as of sort of the timing of it, when we initially filed the petition for enforcement of the subpoenas, we did not believe that jurisdiction was going to be a large issue because of all of these contacts with the U.S. So that's why in our initial papers we focused on the Rule 150 issue, which is the issue that respondents filed the complaint on, and so that's what we focused on. We did include some of the contracts. But given that in their response brief respondents described their contacts with Coinbase as a one-shot contract, that's what they said, that was just inaccurate. So we needed to correct that inaccuracy, that there were more than one contract; there were multiple contracts. And again, counsel has confirmed what we have said here about these contracts with Coinbase. There is no dispute about the facts here. And so I think we have provided more than enough indicia of liability for these agreements, and it's more than enough for the Court to exercise jurisdiction over Kwon and Terraform.

MR. HENKIN: Your Honor, can I respond?

THE COURT: Sure.

MR. HENKIN: A few things.

First of all, we didn't confirm the content or what the SEC would like the Court to infer from these contracts. I would like to mention that Terraform is a fairly large company that does a lot of things besides having created the Mirror Protocol, part of which is the MIR token. It has a lot of very much more substantial products and projects that it works on that have nothing to do, for example, with the Mirror Protocol. So it's the SEC's burden to demonstrate that what it is investigating here, which is only mAssets and the MIR tokens, are related to the things that it has identified as contacts with the U.S. And it hasn't done that. That's one of the reasons why I focused on the listing cases and investor relations and other contacts-type cases because those sorts of things in a generic context are not the same.

So, for example -- and, of course, this is not in the record, but because Mr. Connor brought it up I will also bring it up -- he referred to discussions with the Washington Nationals. Two things about that. One, that started months after the service of the subpoenas was attempted. But, two, it's got nothing to do with the Mirror Protocol or MIR tokens. It has to do with a completely separate -- and I apologize for the fire engines in the background. It has nothing to do with mAssets or MIR tokens. It has to do with a separate cryptocurrency digital asset that TFL had created.

THE COURT: It's a DSL thing called cryptocurrency Terra USD. So it stands for Terra USD.

MR. HENKIN: It's a stable coin. It's not the MIR token and it's not mAssets.

THE COURT: It's based on the Mirror Protocol as well.

MR. HENKIN: No. It can interact with the Mirror Protocol, but Terra USD is separate from the Mirror Protocol. And I don't think that's subject to dispute here.

The second thing is, neither TFL nor Mr. Kwon creates mAssets. Those are created and they are traded by people who use the Mirror Protocol. So it's not up to Mr. Kwon whether mApple or M any other U.S. equity is created. Those are proposed by and voted on by the community. TFL doesn't have control over whether one mAsset gets created; if it does get created, who trades it; if it gets destroyed, or anything like that. In a sense, the Mirror Protocol, one thing that you might analogize it to is a 3D printer, and what somebody who buys a 3D printer makes with it is up to them, not to the company that sells it. At the end of the day, none of this has been linked to the investigation. They are just throwing out contacts. And that's why I think it's very important to focus on, have they demonstrated that any of these contacts are actually related to the things that they are investigating? Because that's what is relevant for specific jurisdiction.

Of course, all of this assumes that service was proper

in the first place. And I just want to say one brief thing about that. We provided all the information, and I don't think it's disputed, that is required by the SEC's Rule 102(b). There is no docket, in the context of a situation like this, in which to file a notice of appearance or any other kind of a form. You provide it to the SEC staff the way we did provide it. They recognized that we were counsel for TFL and Mr. Kwon. And you can't knock out Rule 150(b) by disagreeing with that. It would essentially write the rule out of existence.

That's all I have to say, unless your Honor has further questions.

THE COURT: Thank you.

Let me ask Mr. Connor one more thing, and that is, this Nationals deal, do you agree that because it involves a different product, I guess, cryptocurrency Terra USD is not within what would be a basis for specific jurisdiction because it's not within what the SEC is investigating here?

MR. CONNOR: Your Honor, I think, from our perspective, we don't have those agreements. We can only read what is in the press.

What I will say is, with respect to specific jurisdiction and the contacts between Mr. Kwon in the United States, Mr. Kwon is quoted very heavily in these press releases announcing a deal between his company and a major sports franchise here in Washington, D.C. So I think that does

support our position. We think the Court has general jurisdiction over Mr. Kwon, but also specific jurisdiction over Mr. Kwon. And I think, as Mr. Henkin said, the Terra-related entities that he claims were sort of party to the sponsorship agreement, there is some interaction between those entities and the Mirror Protocol. We can't speak with any more specificity on that because we don't have those agreements yet. But I was just sort of pointing that out as an example of the fact of the contacts between at least Mr. Kwon and Terra-related entities with the United States that continue to be ongoing, in addition to the litany of contacts that we described earlier.

THE COURT: What is the scope of the SEC's investigation?

MR. CONNOR: The SEC's investigation is named *In re Mirror Protocol* and is investigating whether there were potential violations of the securities laws regarding Mirror Protocol; and as we lay out in our papers, under the Mirror Protocol, MIR tokens are created, and mAssets, which mimic U.S.-based securities, are also created.

So I think that's in our papers, and I think that's all that -- yes. To be clear, that is what our subpoena relates to that's at issue here.

So, again, the subpoena relates to the Mirror Protocol through which the MIR tokens and mAssets are created.

MR. HENKIN: Just to get back to the general

jurisdiction point, because Mr. Connor focused on it so much, I would again refer back to *Burnham*, *Hoechst*, and the *Reich* cases, which make clear, although Mr. Connor is correct that *Burnham* was a plurality case, was a plurality decision, the Supreme Court stated it may be that general jurisdiction applies only to corporations. And then the *Hoechst* case said that it wasn't clear that general jurisdiction could ever be held over a private nonresident defendant, i.e., an individual. So there is significant doubt, at least at the federal level and also at the state level, whether general jurisdiction can ever be asserted over a two-legged entity as opposed to a corporate entity.

THE COURT: All right. Thank you for your arguments. I am going to rule.

There are two issues before me. One is whether there was proper service. And on this, I rule that there was proper service. I think Rule 150(a) applies, specifically by its terms, when service is required to be made upon a person represented by counsel who has filed a notice of appearance, and (c) provides for and allows service by handing a copy of the person required to be served, and I think that does require proper service.

Mr. Henkin is a very smart lawyer and has made clever arguments about how, because the respondents were represented by counsel, service had to be made kind of as service through

counsel, but I just don't think Rule 150(a) applies by its terms. And there really is no authority for respondents' position, other than a reply brief by the SEC which is not authority. In any event, I think that that is distinguishable. It's not binding on me. In any event, I think the plain language of Rule 150 permits the service that was made here. And I think the reading proposed by respondents would read out Rule 150(c). This purported gap that respondents' position would create between being personally served and being served through counsel that has "appeared" is illusory and reflects a misreading of SEC rules.

With respect to personal jurisdiction, I don't need to decide the general jurisdiction question because I find that there is specific personal jurisdiction with respect to both Kwon and Terraform Labs because they purposely availed themselves of the privilege of doing business in the United States in several respects that are directly causally connected to the basis for the subpoena at issue here in the sense of but-for causation.

They promoted the Mirror Protocol and MIR tokens through Terraform's website, web application, social media accounts, interviews, and U.S. media.

Second, Kwon corresponded with U.S. digital asset trading platform Coinbase regarding a listing of MIR tokens, which is the governance token of the Mirror Protocol, leading

to a contract between Terraform and the U.S.-based trading platform on the listing of MIR tokens.

Third, Kwon and a Terraform subsidiary entered into an agreement with the U.S.-based digital trading platform under which the U.S. entity paid at least $200,000 for MIR tokens.

Fourth, there was a custody agreement entered with a U.S.-based entity for storing digital assets on behalf of Terraform.

Fifth, there are employees in United States, including the general counsel, which I think is telling.

Sixth, the mAssets mimic U.S. stocks and are plainly being offered to U.S. customers.

And, finally, there is this sponsorship. I note that there is an NBC Sports online article from February 9, which says, "The Nationals announced Wednesday a partnership with the cryptocurrency community Terra, a decentralized autonomous organization run by stakeholders rather than a traditional corporate structure. As part of the agreement, the cryptocurrency Terra USD could be accepted at Nationals Park as a form of payment as early as next season."

Finally, I note that some of the cases that Mr. Henkin has, understandably and quite persuasively, relied on are different because this is a different kind of entity, and that is exactly what is being explored by the SEC. And the fact that this is something that was sort of kicked off and then

managed on an ongoing basis by the community makes it different from a lot of prior case law, and that is exactly what the SEC I think is exploring.

Taken all together, I think that there are clearly sufficient contacts and sufficient personal availment authorizing specific jurisdiction over both Kwon and Terraform, and I find that service is proper, and therefore the application to enforce the subpoena is granted.

MR. HENKIN: Your Honor, at this point, Mr. Kwon and TFL would like to seek a stay of your order pending appeal under FRAP 8. Would you like us to address that now while we are on the call or in some other manner?

THE COURT: How long would you like a stay? I can't remember if the rule provides a specific period.

MR. HENKIN: The rule does not provide a specific period. We will obviously be filing a notice of appeal, and we will ask for expedited treatment, expedited handling of the appeal. So we can get the notice of appeal filed as soon as there is an order from which we can appeal, and we will get that done expeditiously. If your Honor filed it today, I would promise you that we will get the notice of appeal filed no later than Monday, or Tuesday, actually, because Monday is a holiday, so to have the stay pending. We would also file a request for an expedited hearing by the Second Circuit. So we would ask for the stay to last for at least three months or

until the Second Circuit addresses it otherwise.

THE COURT: All right.

Do you want to respond, Mr. Connor?

MR. CONNOR: Your Honor, I have to confess I was not prepared to address the law and the standards for a stay pending appeal. What I can say is that this is a very important investigation to the SEC, and through respondents' failure to comply with the subpoenas, our investigation continues to be delayed. So we would reserve all our rights in opposing a motion for stay of your Honor's order. So I think our position is that the subpoena should be enforced in accordance with the proposed order that we filed along with our application. But we are happy to address, if plaintiffs want to file something, we are happy to research the issue and respond in kind.

THE COURT: OK. For now I will issue the order granting the application, and I will stay my decision for a period of 14 days pending the request by respondents to submit anything requesting more time. But for now I will automatically stay it for 14 days, and you can file either a letter motion or formal motion, letter motion is fine, requesting a longer stay and then the SEC can respond as soon as possible to that. What I would like is, whenever you file it, if the SEC could respond within four business days, then I can determine whether and how long to grant a longer stay.

Does that work?

MR. HENKIN: That's perfect, your Honor. Thank you.

THE COURT: Anything else from Mr. Henkin today?

MR. HENKIN: No, your Honor.

THE COURT: From Mr. Connor?

MR. CONNOR: Nothing from us. Thank you, your Honor.

THE COURT: Thanks, everyone.

We are adjourned. Have a good day.

(Adjourned)